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# A Model Wetlands Protection Ordinance: Legal Considerations

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# A MODEL WETLANDS PROTECTION ORDINANCE: LEGAL CONSIDERATIONS

*Mary Jane Angelo\**

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## I. INTRODUCTION

Many counties in Florida are currently in the process of developing new wetlands protection ordinances, or revising old ones. While public policy supports strict regulation of activities in wetlands, many counties are reluctant to adopt restrictive ordinances because of the potential for large damages awards if the regulations are later found to be temporary takings. Recent Supreme Court case law has upheld the payment of compensation as an appropriate remedy for overly restrictive land use regulations compounding the fears of local governments. This paper summarizes the legal implications of a Model Wetlands

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Protection Ordinance developed by the author.<sup>1</sup> In particular, an outline of the mechanisms that enable local governments to minimize the risk of paying compensation for restrictive wetlands regulations is included.

The Model Ordinance is a prototype to aid Florida's local governments in developing their own wetlands protection ordinances. It is necessary for local governments to adopt wetlands ordinances for several reasons. First, wetlands perform important hydrological, ecological, economic, and sociological functions.<sup>2</sup> These functions are negatively impacted by improper land use.<sup>3</sup> Many of Florida's wetlands have already been destroyed or diminished by improper land development.<sup>4</sup>

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1. M. ANGELO, A MODEL WETLANDS PROTECTION ORDINANCE (Center for Governmental Responsibility, 1987) [hereinafter MODEL ORDINANCE]. This article's appendix contains the sections relevant to the article's discussion. A complete copy of the Model Ordinance is available from the Center for Governmental Responsibility, College of Law, University of Florida, Gainesville, FL 32611.

2. Both wetlands contiguous to waters of the state and isolated wetlands serve the following important functions in the regional hydrologic cycle and ecological system: a. natural storage and conveyance of flood waters; b. barriers to waves and erosion; c. temporary storage of surface waters during times of flood, thereby regulating flood elevations and the timing, velocity, and rate of flood discharges; d. reduce flood flows and the velocity of flood waters, reducing erosion and causing flood waters to release their sediment; e. vegetation filters and holds sediment which would otherwise enter lakes and streams; f. protect water bodies from sediments, nutrients, and other natural and man-made pollutants (Wetlands vegetation filters sediment, organic matter, and chemicals. Microorganisms utilize dissolved nutrients and breakdown organic matter); g. sources of nutrients for the commercial fish and shellfish industries; h. provide essential breeding and predator escape habitats for many forms of waterfowl, mammals, and reptiles; i. depended upon by almost 35% of all rare and endangered animal species; and j. provide excellent recreational opportunities including recreational fishing, hunting, camping, photography, boating, and nature observation; important as a source of ground and surface water. See MODEL ORDINANCE, *supra* note 1, § I(A)(1). The wetlands functions were compiled from various sources including: J. KUSLER, OUR NATIONAL WETLANDS HERITAGE: A PROTECTION GUIDEBOOK (1983); MASS. GEN. LAWS ANN. ch. 131, § 40 (West 1981); APOXSEE, SARASOTA COUNTY'S COMPREHENSIVE PLAN ENVIRONMENT ELEMENT (1980).

3. Improper land uses in and adjacent to wetlands may result in: flooding; erosion; decrease in storage capacity of watersheds; increased sedimentation; decreased water quality; reduced groundwater recharge; decreased breeding, nesting, and feeding area for water fowl and shore birds; decreased nutrients available for fish and wildlife; decreased habitat for fish and wildlife; and reduced aesthetic and recreational values. See generally Connor & Day, *The Ecology of Forested Wetlands in the Southeastern United States*, in WETLANDS ECOLOGY AND MANAGEMENT (1982); R. GOODWIN & W. NIERING, INLAND WETLANDS OF THE UNITED STATES (National Park Service, Natural History Theme Studies, No. 2, 1975).

4. The United States Army Corps (Corps) of Engineers, in attempting to provide flood control, irrigation water, and inland waterways, has greatly modified the state's major wetlands. Agricultural drainage and encroachment by livestock have severely modified the original vegetation as well. Remaining wetlands are constantly threatened by strong developmental pressures. See R. GOODWIN & W. NIERING, *supra* note 3.

Second, current federal and state wetlands regulations provide inadequate protection to wetlands functions. For example, federal law does not regulate any activity that does not involve discharge of dredge or fill materials into waters of the United States.<sup>5</sup> Federal law further exempts from regulation agricultural activities and only provides for general permitting for certain other discharges.<sup>6</sup> Federal jurisdiction does not extend to wetlands that are not "contiguous or adjacent" to waters of the United States.<sup>7</sup> Additionally, judicial interpretations of federal regulations have severely weakened the wetlands permitting criteria.<sup>8</sup> Likewise, Florida's Wetlands Protection Act and related regulations<sup>9</sup> do not adequately protect the important natural functions of the state's wetlands. The Florida Wetlands Act exempts major ac-

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5. Section 404 of the federal Clean Water Act (CWA), 33 U.S.C.A. § 1344 (West 1985), is the primary statutory authority for federal involvement in controlling the use of wetlands. Section 404 regulates the discharge of dredged or fill material in the nation's waters. The CWA only regulates "point sources," which are defined as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." *Id.* § 1362(14) (1985). Any activity that does not involve a discharge is not subject to regulation under section 404, even if the activity ultimately results in the total destruction of wetlands functions. For example, discharge from non-point sources, such as agricultural and storm water runoff are not covered by the CWA. Many other destructive activities, such as drainage, are outside the scope of the permitting process.

6. The CWA exempts two types of activities: 1) all normal farming, silviculture, and ranching activities; and 2) certain federal construction projects specifically authorized by Congress. In addition to the outright exemptions, specific categories of discharges are given only limited coverage by the regulations in the form of general permits. Section 404(e)(1) authorizes the issuance of general permits on a nationwide, regional, or statewide basis for categories of activities that are similar in nature and will cause only minimal adverse effects on the environment, individually and cumulatively. Section 404(e)(1) also provides for general permitting for dredge and fill activities that take place above headwaters or in isolated wetlands and lakes of less than ten acres.

7. The Corps' definition of wetlands is the same as the definition used in the Model Ordinance. Wetlands are defined as lands that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." See MODEL ORDINANCE, *supra* note 1, § II(34). However, the Corps' jurisdiction does not extend to all wetlands. For example, the Corps' regulations limit jurisdiction to wetlands that are "contiguous or adjacent" to waters of the United States. 33 C.F.R. § 323.2(d) (1983). Therefore, jurisdiction does not extend to isolated wetlands that are not adjacent to waters of the United States.

8. See, e.g., 1902 Atlantic Ltd. v. Hudson, 574 F. Supp 1381 (E.D. Va. 1983) (holding the permitting requirement that an activity be "water dependent" as merely part of a general weighing process and not a prerequisite to the issuance of a permit); Hough v. Marsh, 557 F. Supp. 74 (D. Mass 1982).

9. Warren S. Henderson Wetlands Protection Act of 1984, FLA. STAT. ANN. § 403.91-.908 (West 1985).

tivities, such as agriculture, which may have significant effects on wetland functions.<sup>10</sup> The Act fails to give the state regulatory jurisdiction over many functioning and ecologically important wetland systems.<sup>11</sup> In addition, the Act's criteria are vague and not stringent enough to protect wetlands from the adverse impacts of development.<sup>12</sup> Furthermore, federal and state governments generally protect only wetlands of national or state concern; local wetlands often are unprotected.

Third, local governments have generally had broader police powers to regulate land use than other levels of government.<sup>13</sup> Fourth, Florida's 1985 Growth Management Act mandates that local governments plan for the management of wetlands in their comprehensive plans and adopt land development regulations consistent with the plan.<sup>14</sup> Finally, local governments may regulate wetlands more cheaply and easily and with less bureaucracy than other levels of government.

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10. The Henderson Wetlands Act only applies to certain "dredge and fill" activities. Activities such as drainage, harvesting natural products, changing or obstructing water flow, and polluting are not considered "dredge and fill," and are not subject to the Act. Section 403.912 exempts from the Act's permit criteria certain residential subdivisions and expansion of limerock and sand mining for ten years. *Id.* § 403.912. Additionally, section 403.927 exempts all agricultural activities and agricultural water management systems. The legislative intent was that Florida's five regional water management systems be responsible for the regulation of agriculture. *Id.* § 403.927.

11. The Henderson Wetlands Act prohibits dredging and filling conducted in, on, or over surface waters of the state without a permit. *Id.* § 403.913. DER's rules define the state's surface waters as rivers, tributaries, streams, bays, natural lakes, the Atlantic Ocean, and the Gulf of Mexico. The landward extent of these waters is established by dominant plant species. Rule 17-4.022 of the Florida Administrative Code provides a list of about 300 vegetative species used to determine dominance. FLA. ADMIN. CODE. 17-4.022. The dominance calculation is based on relative areal extent of submerged, transitional, and upland species. The Henderson Wetlands Act limits the landward extent of surface waters by providing several "backstops" to jurisdiction. If hydric soils are not present, a presumption is created that the site is not a wetlands even though the site contains a dominance of wetland vegetation. If hydric soils are present, the site is presumed to be wetlands. Further, jurisdiction cannot extend beyond the ten-year flood line or the area of land inundated for more than 30 consecutive days per year, whichever is more landward. The Act also limits jurisdiction over intermittent streams to the point of intermittency, absent a continuation of wetland vegetation. FLA. STAT. ANN. § 403.912(5) (West 1985). DER's jurisdiction does not extend to wetlands connected by ditches to waters of the state. Furthermore, DER's jurisdiction does not cover any isolated wetlands regardless of size.

12. *See supra* note 10.

13. *See generally* O. REYNOLDS, LOCAL GOVERNMENT LAW chs. 18-21 (1982) (discussion of local governments' powers such as zoning, eminent domain, urban renewal and public housing, and urban planning respectively).

14. *See generally* Baird, *A County Wide Future Land Use Plan: The Palm Beach County Experience*, 1 U. FLA. J.L. & PUB. POL'Y 133, 139-41 (1987) (discussion of the practical implications of local growth management planning).

## II. IMPORTANT ASPECTS OF THE ORDINANCE

### A. *The Regulatory Approach*

The basic regulatory approach the ordinance takes is based on the Massachusetts Wetlands Protection Act (MWPA).<sup>15</sup> The MWPA's underlying premise is the protection of important natural wetlands functions.<sup>16</sup> This "function-based" approach varies greatly from the more commonly used "activity-based"<sup>17</sup> and "public interest criteria-based"<sup>18</sup> approaches.

Historically, many wetlands protection regulations have been "activity-based."<sup>19</sup> This approach lists permissible and impermissible wetlands activities. Unfortunately, this approach produces illogical results because it permits, or fails to prohibit, harmful wetlands activities. For instance, permissible activities often included agricultural uses.<sup>20</sup> Agricultural activities may have extreme adverse impacts on wetland functions. Likewise, some prohibited activities may not have significant adverse effects on wetland functions if done on a small scale or if mitigative measures were used.<sup>21</sup>

The other commonly used approach to wetlands regulations is the "public interest criteria-based" approach used in both the federal Clean Water Act<sup>22</sup> and Florida's Wetlands Protection Act.<sup>23</sup> Florida's approach weighs seven public interest criteria.<sup>24</sup> The criteria include

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15. MASS. GEN. LAWS ANN. ch. 131, § 40 (West 1981).

16. See *supra* note 2.

17. An example of an activity based wetlands protection regulation is the Martin County, Florida comprehensive plan. This plan prohibits most activities in wetlands, but allows several listed activities. These activities include: riparian access for water dependent docks and boat ramps; access to wetlands when there is no other way to get there; removal of exotics; and one single family home on a lot of record. See M. Hurchalla, *A Community Perspective for Wetlands Protection*, in WETLAND PROTECTION: STRENGTHENING THE ROLE OF THE STATES (1984) (discussing the Martin County Comprehensive Plan).

18. See *infra* notes 22-28 and accompanying text.

19. See, e.g., 33 U.S.C.A. § 1344 (West 1985) (regulating the "discharge of dredged or fill material").

20. See, e.g., PUTNAM COUNTY, NEW YORK, FRESHWATER WETLANDS ORDINANCE (1985). This ordinance prohibits several listed activities but allows others including "the activities of farmers . . . in grazing and watering livestock . . . selectively cutting timber, draining land or wetlands for growing agricultural products and otherwise engaging in the use of wetlands for growing agricultural products. . . ." *Id.* See also 33 U.S.C.A. § 1344 (West 1985) (exempting agricultural activities from regulation).

21. For example, single family housing at a density of one unit per five acres may not have any significant effect on wetland function.

22. 33 U.S.C.A. § 1344 (West 1982).

23. FLA. STAT. ANN. § 403.91-.938 (West 1985).

24. Section 403.918(1) of the Florida Statutes requires a permit applicant to provide DER with reasonable assurance that the water quality standards codified in section 403.929 will not

some wetlands functions such as effects on fish and wildlife, navigation, and sedimentation.<sup>25</sup> This public interest criteria approach has a better "means to end" fit than the activity based approach. In other words, an approach that explicitly considers wetlands' functions to determine whether an activity is permissible protects these functions better than merely prohibiting some activities and allowing others. However, Florida's approach is only one step in the right direction. The seven criteria do not include all important wetland functions.<sup>26</sup> Nor do they link wetlands' functions to specific wetland types.<sup>27</sup> Furthermore, DER is only required to consider these criteria.<sup>28</sup> DER has no standards to guide it in determining how much weight to give each criterium.

The Model Ordinance directly protects wetlands' functions.<sup>29</sup> The Ordinance identifies a list of functions that each type of wetland is presumed to perform.<sup>30</sup> The Ordinance provides that any activity proposed or undertaken within an area subject to regulation, which will remove, fill, drain, dredge, or in any way alter that area, is subject to regulation and requires the filing of a notice of intent.<sup>31</sup> A person filing a notice of intent has the burden of demonstrating that either a) the particular wetland does not perform any of the functions that

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be violated. FLA. STAT. ANN. § 403.918(1) (West 1985). Florida Statute section 403.928(2)(a) requires DER to consider the following criteria in wetlands permitting decisions:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the area;
5. Whether the project will be of a temporary or permanent nature;
6. Whether the project will adversely affect or will enhance significant historical and archeological resources;
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

FLA. STAT. ANN. § 403.928(2)(a) (West 1985).

25. *Id.* § 403.918(2)(a).

26. For example, section 403.918(2)(a) does not directly require DER to consider effects on flood conveyance, flood storage, pollution control, species diversity, and evapotranspiration. FLA. STAT. ANN. § 403.918(2)(a) (1985).

27. *Id.* § 403.918.

28. Section 403.918(2)(a) of the Florida Statutes states that "[i]n determining whether a project is not contrary to the public interest, or is clearly in the public interest, the department shall *consider and balance* the following criteria . . . ." (emphasis added). *Id.* § 403.918(2)(a).

29. MODEL ORDINANCE, *supra* note 1, § I(B).

30. *See id.* § V(C) (not in Appendix due to length). The wetland functions were compiled from various sources. *See supra* note 2.

31. MODEL ORDINANCE, *supra* note 1, § IV(1).

it is presumed to, or b) the proposed activity will have an insignificant effect on any of the functions the wetland is presumed to perform.<sup>32</sup> If the applicant cannot meet this burden of proof on either of these two issues, the applicant does not receive a permit and can not proceed with the proposed activity.<sup>33</sup>

### B. *Cumulative Impacts and Water Dependency Exemption*

Under the Model Ordinance, an applicant must show that the cumulative impacts of all property owners in the wetland system carrying out the same activity as the applicant proposes would have an insignificant effect on the wetland's functions.<sup>34</sup> An applicant can show this in one of several ways. First, the applicant could show that even if every landowner in the wetland system carried on the proposed activity the cumulative effect would be insignificant.<sup>35</sup> Second, the applicant can show that the proposed activity is unique, and therefore, would not be attempted by other landowners.<sup>36</sup> Third, the applicant can show that other landowners are barred from attempting that activity either because they have given a conservation easement on their land or because their land is in a Special Management Area which prohibits the proposed activity.<sup>37</sup>

Some activities having a significant adverse effect on wetland functions are of such important public interest and are so dependent on being located in or near water that they should be allowed.<sup>38</sup> Under the Model Ordinance, these water dependent activities are permissible if the public interest served by the activity substantially outweighs its adverse environmental effects and no practicable alternative exists.<sup>39</sup> Water dependency, however, should be construed narrowly and does not include waterfront housing.<sup>40</sup> Permissible water dependent activities which have significant adverse effects must be designed to minimize such effects.<sup>41</sup> If adverse effects cannot be reduced sufficiently, mitigation is required.<sup>42</sup>

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32. *Id.* § V(B).

33. *Id.*

34. *Id.* § V(B)(3).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* § V(G). The list of water dependent activities in this section is based on those in the Florida Administrative Code. FLA. ADMIN. CODE § 17-12.090 (Short Form Applications).

39. MODEL ORDINANCE, *supra* note 1, § V(G)(1).

40. *Id.* § V(G)(2).

41. *Id.* § V(G)(1).

42. *Id.* Mitigation refers to actions required to be taken by applicants to compensate for environmental impacts of permitted activities. This term includes: avoiding the impact altogether



### C. Variances

The Model Ordinance has a variance procedure that minimizes the risk that the Ordinance, as applied to an individual landowner, results in a taking requiring the payment of compensatory damages for the period of non-use.<sup>43</sup> A local government may grant a variance where an applicant is successful in challenging the Ordinance as being so restrictive as to constitute a taking.<sup>44</sup> In general, a taking is found only where the Ordinance's application is so restrictive that it deprives the landowner of substantially all use of his property.<sup>45</sup> Courts consider factors such as the reasonable expectations of the landowner and whether the site contains developable uplands as well as wetlands in determining whether a taking occurs.<sup>46</sup> If the local government can show an alternative design plan that allows some use of the property, it need not grant a variance. Conversely, the local government may grant a variance if it determines that the Ordinance's application results in a taking. A variance should only be granted to the extent necessary to allow a reasonable use of the property to avoid a taking. Instead of granting a variance, the local government may choose to purchase the environmentally important lands through its eminent domain power. These lands should be restricted by conservation easements to protect them from future development.<sup>47</sup>

## III. LEGAL CONSIDERATIONS

### A. Authority to Enact: Home Rule Powers

The authority to regulate land use and development is vested in the states through the tenth amendment of the United States Constitution.<sup>48</sup> The Florida Constitution, Article VIII, delegates this authority to local governments as home rule powers.<sup>49</sup> Both the Florida Constitu-

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by not taking a certain action or parts of an action, minimizing impacts by limiting the degree of magnitude of an action and its implementation, rectifying the impact by repairing, rehabilitating, or restoring the affected environment, reducing or eliminating impact over time by preservation and maintenance operations during the life of the action, and compensating for the impact by replacing or providing substitute resources or environments. *Id.* § III(21).

43. *Id.* § VII(F).

44. *Id.* § VII(F)(1).

45. *Id.* § VII(F)(2). See also *infra* notes 127-75 and accompanying text.

46. See generally D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING & LAND DEVELOPMENT CONTROL* 318-24 (2d ed. 1986) (discussion of the Takings Clause's application to land use regulations).

47. See *infra* note 165 for the definition of a conservation easement.

48. U.S. CONST. amend. X.

49. FLA. CONST. art. VIII, §§ 1-2.

tion and Florida legislation treat home rule powers for municipalities, charter counties, and non-charter counties separately.

### 1. Municipalities

The Florida Constitution grants broad home rule powers to municipalities. Article VIII, Section 2(b) empowers municipalities to "conduct municipal government, perform municipal services, and . . . exercise any power for municipal purposes except as otherwise provided by law."<sup>50</sup> Although the Florida Constitution's clear intent is to grant broad home rule powers to municipalities, the Florida Supreme Court in 1972 took a narrower view. In *City of Miami Beach v. Fleetwood Hotel, Inc.*<sup>51</sup> the Court held that the Florida Constitution did not alter the rule that the paramount source of municipality authority is in its charter. The Court indicated the charter grants to the municipality all the powers it possesses unless other statutes apply.<sup>52</sup> In response to this decision, the Florida Legislature enacted the Municipal Home Rule Powers Act in 1973. This Act reaffirmed the broad grant of home rule powers to municipalities.<sup>53</sup> The Florida Supreme Court has since expressly upheld the validity of this legislative delegation of powers to municipalities.<sup>54</sup>

### 2. Charter Counties

The Florida Constitution grants to charter counties the same broad home rule powers that municipalities exercise. Article VIII, Section 1(g) vests in charter counties "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors."<sup>55</sup> Further support for broad home rule powers in charter counties can be found in Florida Statutes, Chapter 125. This chapter grants numerous and extensive powers to counties and expressly states "the provisions of this section shall be liberally construed in order to . . . secure for the counties the broad exercise of home rule powers authorized by the State Constitution."<sup>56</sup> Courts have held this statute is sufficient to permit counties to execute the home rule provisions of the Constitution.<sup>57</sup>

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50. *Id.* art. VII, § 2(b).

51. 261 So. 2d 801 (Fla. 1972).

52. *Id.* at 803.

53. FLA. STAT. ANN. § 166.021(1) (West 1985).

54. *See City of Miami Beach v. Forte Towers, Inc.*, 305 So. 2d 764 (Fla. 1975).

55. FLA. CONST. art. VIII, § 1(g).

56. FLA. STAT. ANN. § 163.3194(1) (West 1985).

57. *See Speer v. Olson*, 367 So. 2d 207 (Fla. 1978).

### 3. Non-Charter Counties

The Florida Constitution only grants limited home rule powers to non-charter counties. Article VIII, Section 1(f) provides non-charter counties "shall have such power of self-government as is provided by general or special law" and "may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law."<sup>58</sup> Therefore, non-charter counties must look to enabling legislation to define the limits of their home rule authority. Chapter 125 of the Florida Statutes confers on all counties, charter and non-charter, the authority to perform acts that are not inconsistent with other general or special laws of the state and are necessary to carry out governmental objectives.<sup>59</sup> The Florida Supreme Court has upheld this statute and its broad grant of home rule powers to all counties.<sup>60</sup>

In sum, the broad grants of home rule powers in Article VIII and chapters 166 (Municipalities) and 125 (Counties) enable municipalities and counties to enact land use regulations subject to specific limitations imposed by state statute. No Florida statute exists prohibiting local governments from enacting wetlands protection ordinances.

Strengthening local governments' authority to regulate wetlands is the fact the Florida Wetlands Protection Act of 1984 provides that "[n]othing [in this Act] alters or modifies the powers of a local government or precludes a local government from adopting a dredge and fill regulatory program, provided the local governmental program is first approved by the department pursuant to section 403.182."<sup>61</sup> This section allows cities and counties to establish and administer local pollution control programs if: a) DER approves their ability to adequately meet the requirements of 403; b) the requirements of the local law are compatible with, or stricter or more extensive than those of 403; c) the local law provides for enforcement; and d) the local law provides for administrative organization, staff, financial resources, and other resources necessary to carry out the program.<sup>62</sup>

Further, the Local Government Comprehensive Planning and Land Development Act (LGCPLDA) mandates that local governments adopt

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58. FLA. CONST. art. VIII, § 1(f).

59. FLA. STAT. ANN. § 125.01 (West 1985). In addition, the statute's provisions "shall be liberally construed in order to effectively carry out the purpose of [Chapter 125] and to secure for the counties the broad exercise of home rule powers authorized by the States." *Id.* § 125.01(3)(b).

60. See *Speer v. Olson*, 367 So. 2d 207 (Fla. 1979).

61. FLA. STAT. § 403.916 (West 1987).

62. *Id.* § 403.182.

a comprehensive plan and enact land development regulations which contain provisions necessary or desirable to implement the plan.<sup>63</sup> These land development regulations must be consistent with the comprehensive plan.<sup>64</sup> Section 163.3177 of the LGCPLDA requires each comprehensive plan to include certain required elements. Among these required elements is an element "for the conservation, use, and protection of natural resources in the area, including . . . wetlands."<sup>65</sup> This section further requires that the land use map or series of maps in the future land use element generally depict and identify rivers, bays, lakes, flood plains, harbors, estuarine systems, and wetlands.<sup>66</sup>

Section 163.3213 of the LGCPLDA requires that local governments adopt and enforce land development regulations that are consistent with their adopted comprehensive plan.<sup>67</sup> Included in the minimum requirements for these land development regulations are: regulation of the use of land and water; provisions for the protection of potable wellfields; regulation of areas subject to seasonal and periodic flooding; provisions for drainage and stormwater management; and protection of environmentally sensitive lands designated in the comprehensive plan.<sup>68</sup>

In summary, local governments have the authority to regulate land use under the broad home rule powers that state constitutional and legislative provisions confer. Additionally, the Henderson Wetlands Act explicitly reserves to the local governments the power to carry out their own wetlands regulation. Finally, the LGCPLDA mandates that local governments adopt a conservation plan for the conservation, use, and protection of wetlands. The LGCPLDA also requires that local governments adopt land development regulations necessary to implement the plan.

### B. *Constitutional Limitations*

The enactment of a wetlands protection ordinance must be pursuant to authority the state constitution or state statutes grant. It must also meet five other constitutional requirements. First, the ordinance's provisions must be reasonably related to a valid regulatory objective (substantive due process). Second, the procedures local governments use in implementing the ordinance must be fair (procedural due pro-

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63. *Id.* §§ 163.3161-3243.

64. *Id.* § 163.3202(3).

65. *Id.* § 163.3177(4)(d).

66. *Id.*

67. *Id.* § 163.3213.

68. *Id.*

cess). Third, the ordinance must not illegally discriminate in favor of particularly classes of persons or property (equal protection). Fourth, the regulation must not be so confiscatory as to constitute a taking without just compensation (eminent domain). Fifth, the delegation of governmental regulatory authority must be accompanied by sufficient standards and guidelines to direct officials' decision-making. Each of these constitutional restraints are considered in the next sections.

### 1. Substantive Due Process

Wetlands protection regulations are an exercise of the "police power" which is the inherent power of state and local governments to regulate to protect the health, safety, morals, or general welfare of the people.<sup>69</sup> Generally, courts are reluctant to overturn local government land use regulations as invalid exercises of the police power.<sup>70</sup> Courts take the position that citizens should determine what regulatory measures are needed for their own self-government through their local legislative body.<sup>71</sup> Circumstances exist, however, in which courts will find a legislative body has exceeded its authority even in the absence of any express constitutional or legislative prohibition. This limitation on police power is termed substantive due process analysis. The substantive due process doctrine is derived from the fourteenth amendment to the United States Constitution which states "[n]or shall any state deprive any person of life, liberty or property without due process of law."<sup>72</sup> Under contemporary constitutional analysis, when the government deprives persons of fundamental rights, it must show the deprivation is necessary to promote a compelling state interest.<sup>73</sup> In the case of most land use regulations, no fundamental rights are involved. Thus, the regulations must only bear some rational relationship to a legitimate end of government.<sup>74</sup> A two part test determines whether a regulation meets this standard. First, the regulation's objectives must be valid.<sup>75</sup> Proper police power objectives are those that bear a substantial relationship to the protection of the health, safety,

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69. See generally D. HAGMAN & J. JUERGENSMEYER, *supra* note 46, at 296.

70. *Id.*

71. See J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 358 (3d ed. 1986) (discussing the judiciary's recognition that other branches of government should be granted broad latitude in dealing with issues of "economic social welfare").

72. U.S. CONST. amend. XIV.

73. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 71, at 358.

74. *Id.*

75. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

morals, and general welfare of the public.<sup>76</sup> Second, the regulation must be reasonably related to the achievement of the valid objectives.<sup>77</sup>

a. Valid Objective

Wetlands protection regulations are only valid if enacted for purposes within the scope of proper police power objectives. The scope of permissible regulatory objectives under the police power is very broad. In the leading case of *Berman v. Parker*,<sup>78</sup> the United States Supreme Court stated with regard to the police power:

An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determination addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . . The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.<sup>79</sup>

This passage reflects the breadth of the legitimate exercise of police powers. The Model Ordinance lists a number of objectives that require the exercise of broad police powers:

[t]o minimize the potential for property damage and personal injury from flooding; to prevent increases in erosion; to maintain optimum storage capacity of watersheds; to prevent increased sedimentation; to maintain water quality; to maintain recharge for groundwater aquifers; to maintain breeding, nesting, and feeding areas for waterfowl and shore birds; to maintain the exchange of nutrients needed for fish and other wildlife; to maintain habitat for fish and other wildlife; to maintain sites needed for education and scientific research;

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76. *Id.*

77. *Powell v. Pennsylvania*, 128 U.S. 678, 684-85 (1888).

78. 348 U.S. 26 (1954).

79. *Id.* at 32-33.

to protect the public's rights in navigable waters; to protect recreation opportunities; to protect aesthetic and property values.<sup>80</sup>

Courts have expressly or impliedly upheld all of these objectives as legitimate under the substantive due process doctrine.<sup>81</sup>

For example, the Florida Supreme Court has stated that "[p]rotection of environmentally sensitive areas and pollution control are legitimate concerns within the police power."<sup>82</sup> Likewise, a Florida appellate court found that wetlands play an important role in protecting against flooding and storm damage.<sup>83</sup> Recognizing that the Florida Constitution establishes a policy of conserving and protecting the state's natural resources and scenic beauty,<sup>84</sup> the court stated "there is no question that the police power may be exercised to protect and preserve the environment."<sup>85</sup> Other Florida courts have upheld as proper police power objectives: protection of public water supply;<sup>86</sup> reduction of air pollution;<sup>87</sup> protection of the public trust in navigable waters;<sup>88</sup> stabilization of growth to promote orderliness, convenience, health, and beauty;<sup>89</sup> protection of aesthetics;<sup>90</sup> protection of property values;<sup>91</sup> and residential interests in comparative tranquility and quiet seclusion.<sup>92</sup> Similarly, courts in other states have upheld as valid objectives of the police power: prevention of pollution;<sup>93</sup> avoidance of flood damage;<sup>94</sup> maintenance of groundwater levels;<sup>95</sup> protection of fish and wildlife

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80. See MODEL ORDINANCE, *supra* note 1, § I(B).

81. See D. HAGMAN & J. JUERGENSMEYER, *supra* note 46, at 296-98 (stating courts will uphold land use regulations that serve legitimate health, safety, or welfare objectives).

82. *Graham v. Estuary Properties, Inc.* 399 So. 2d 1374, 1381, *cert. denied*, 454 U.S. 1083 (1981).

83. *Indialantic v. McNulty*, 400 So. 2d 1227, 1230-32 (Fla. 5th D.C.A. 1983).

84. FLA. CONST. art. II, § 7.

85. 400 So. 2d at 1232.

86. *Lovequist v. Conservation Comm'n of Town of Dennis*, 393 N.E.2d 858 (Mass. 1979).

87. *Miami Beach v. Hogan*, 63 So. 2d 493 (Fla. 1953), *cert denied*, 346 U.S. 819 (1953).

88. *State ex. rel. Wilcox v. T.O.L., Inc.*, 206 So. 2d 69 (Fla. 4th D.C.A. 1968).

89. *St. Petersburg v. Aiken* 208 So. 2d 268 (Fla. 2d D.C.A. 1968), *rev'd on other grounds*, 217 So. 2d 315 (1968); *Aiken v. Dacis, Inc.*, 106 Fla. 675, 143 So. 658 (1932).

90. *International Co. v. Miami Beach*, 90 So. 2d 906 (Fla. 1965); *Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941); *Rotenburg v. Ft. Pierce*, 202 So. 2d 782 (Fla. 4th D.C.A. 1967).

91. *Trachsel v. Tamarac*, 311 So. 2d 137 (Fla. 4th D.C.A. 1975).

92. *Memphis v. Greene*, 451 U.S. 100 (1981).

93. *Potomac Sand & Gravel v. Governor of Maryland*, 293 A.2d 241 (Md. 1972).

94. *State v. A. Capuano Bros.*, 384 A.2d 610 (R.I. 1978).

95. *Lovequist v. Conservation Comm'n of Town of Dennis*, 393 N.E.2d 858 (Mass. 1979).

habitat;<sup>96</sup> and preservation of plant communities.<sup>97</sup> In summary, the Model Ordinance's objectives are valid exercises of local governments' police powers.

b. Reasonableness

Substantive due process also requires that the means local governments choose to accomplish their objectives must be reasonable. Courts generally defer to local governments and presume that properly enacted ordinances are valid.<sup>98</sup> An applicant challenging an ordinance may overcome this presumption by demonstrating that it is not even "fairly debatable" that the means chosen are reasonably related to the valid regulatory objective.<sup>99</sup> This burden, however, is extremely difficult to meet. Courts routinely find the means employed by the local government to be "reasonably necessary" to accomplish the valid police power objective.<sup>100</sup>

A leading Florida case discusses the reasonable relation prong of the substantive due process analysis. The court in *Indialantic v. McNulty*,<sup>101</sup> considered a constitutional challenge to a zoning ordinance restricting the use of certain wetland and coastal areas. The court held that because of the important role that wetlands play in protecting inland areas from flood and storm damage, the applicant failed to show that the ordinance was arbitrary or more severe than necessary to achieve valid police power purposes.<sup>102</sup> The court noted that when a zoning ordinance is challenged as being invalid on its face, courts presume the ordinance is valid; then, if it is fairly debatable that the ordinance is reasonably related to public health, safety, and welfare, the court will uphold the ordinance. The court's rationale was that substituting a judicial determination of the best means to further the ordinance's objective for that of the local government violates the separation of powers doctrine.<sup>103</sup> Because zoning is a legislative function, courts should not act as "super zoning boards."<sup>104</sup> The court

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96. *Potomac Sand & Gravel v. Governor of Maryland*, 293 A.2d 241 (Md. 1972).

97. *Id.*

98. *See Powell v. Pennsylvania*, 128 U.S. 678, 684-85 (1888); *Parking Facilities, Inc. v. City of Miami Beach*, 88 So. 2d 141 (Fla. 1956).

99. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); *City of Miami Beach v. Lachman*, 71 So. 2d 148, 152 (Fla. 1953).

100. *See J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 71, at 358.*

101. 400 So. 2d 1227 (Fla. 5th D.C.A. 1983).

102. *Id.* at 1233.

103. *Id.* at 1230.

104. *Id.*



further noted that the burden of showing the ordinance is invalid is on the challenger, not the zoning authority.<sup>105</sup>

Because courts are unwilling to find zoning or land use ordinances violative of the substantive due process doctrine, it is unlikely that any substantive due process challenge to the Model Ordinance would be successful. Furthermore, the *Indialantic* decision provides direct support of the constitutionality of restrictive wetlands regulations.

## 2. Procedural Due Process

The fourteenth amendment to the United States Constitution provides that states shall not deprive persons of their property without due process of law.<sup>106</sup> Three main issues are involved in any procedural due process case:

1. Was the deprivation the result of state action?
2. Is there a legally protected property interest at stake?
3. Was an appropriate hearing provided?<sup>107</sup>

First, the issue whether a deprivation of property rights resulted from "state action" rarely arises in land use regulation challenges. In the procedural due process context, the enactment of land use regulations by local governments are generally "state actions."<sup>108</sup> Second, state law determines whether a legally protected property interest exists.<sup>109</sup> In the land use context, legally protected property interests include all of the traditional forms of real and personal property plus any entitlements to governmental benefits.<sup>110</sup>

The issue more likely to be disputed in wetlands regulations cases is whether the local government followed adequate procedures. A landowner making a procedural due process challenge must show that the local government failed to provide adequate procedural safeguards in depriving the landowner of the asserted property interest. A mere deviation from established procedures is insufficient to establish a procedural due process violation.<sup>111</sup> In these types of cases, the court will only look to see if the local government treated the landowner arbitrarily or discriminatorily.<sup>112</sup>

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105. *Id.*

106. U.S. CONST. amend. XVI.

107. Board of Regents v. Roth, 408 U.S. 564 (1972).

108. Lovell v. City of Griffin, 303 U.S. 444 (1938).

109. Roth, 408 U.S. at 507.

110. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 71, at 473-476.

111. See Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

112. See, e.g., Glassman v. Township of Falls, 547 F. Supp. 362, 369-70 (E.D. Pa. 1982).

Similarly, landowners have difficulty in successfully challenging land use regulations based on the failure of established procedures to meet minimum due process standards. In the land use context, these minimum procedural safeguards require that local government provide a landowner with the following: (1) notice of the relevant public hearing;<sup>113</sup> (2) an opportunity to be represented by counsel to present their views;<sup>114</sup> (3) consideration of the information presented by the landowners;<sup>115</sup> and (4) judicial review in state court.<sup>116</sup> The Model Wetlands Protection Ordinance provides all of these constitutionally required procedural safeguards.<sup>117</sup>

### 3. Equal Protection

The fourteenth amendment to the United States Constitution provides that no state shall deny persons within its jurisdiction equal protection of the laws.<sup>118</sup> A wetlands regulation that imposes different burdens on different classes of lands may be challenged on equal protection grounds. Unless the regulation's classification system impinges on a fundamental right<sup>119</sup> or is based on a suspect class,<sup>120</sup> however, the local government need only show a rational relationship exists between the classification and a legitimate government interest. Therefore, a wetlands ordinance that merely burdens different classes of lands differently must only meet the rational relation test to be valid.

Courts have routinely upheld land use regulations that burden different classes of land differently. For instance, equal protection challenges have failed in cases involving (1) the regulation of coastal wetlands but not inland wetlands,<sup>121</sup> (2) the regulation of natural wet-

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113. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 71, at 484.

114. *Id.*

115. *Id.*

116. See, e.g., *Creative Environments, Inc. v. Eastbrook*, 680 F.2d 822, 830-31 (1st Cir. 1982); *Molgard v. Town of Caledonia*, 527 F. Supp. 1073, 1082-83 (E.D. Wis. 1981).

117. See generally MODEL ORDINANCE, *supra* note 1, § VII (includes notice, public hearing, variances procedures, etc.).

118. U.S. CONST. amend. XIV.

119. Fundamental rights are limited to the rights of freedom of religion, free speech, and privacy. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 71, at 370-72. Land use regulations rarely impinge on these fundamental rights or liberties. See D. HAGMAN & J. JUERGENSMEYER, *supra* note 46, at 300-01.

120. Suspect classes are limited to classifications based on race or alienage. See J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 71, at 330. Local wetlands protection ordinances generally should not infringe upon suspect classes because the classification schemes are based on differences among types of land not on race or alienage.

121. *J.M. Mills, Inc. v. Murphy*, 352 A.2d 661 (R.I. 1976).

lands but not manmade wetlands,<sup>122</sup> and (3) the regulation of coastal wetlands based on the degree of already existing development.<sup>123</sup>

The Model Ordinance differentiates between both different types of wetlands systems and functioning versus non-functioning wetlands.<sup>124</sup> These classifications will likely be upheld because rational reasons exist for them. Differentiating between different types of wetlands is necessary because different wetland types perform different functions and have different ecological and economic values.<sup>125</sup> Because the Model Ordinance's objective is to protect important wetland functions, it is reasonable to vary the restrictiveness of the regulation depending on the functions that the particular type of wetland is known to perform. Likewise, because degraded wetlands may not perform as many functions as healthy wetlands, it is rational to provide for stricter regulations for healthy wetlands to insure the protection of these functions. Furthermore, the Model Ordinance provides a mechanism by which an applicant can overcome the presumption the particular wetlands performs the functions that type of wetlands presumptively performs.<sup>126</sup>

#### 4. The Taking Issue

The fifth amendment to the United States Constitution prohibits the government from taking private property for public use without payment of just compensation.<sup>127</sup> Historically, this clause applied only where the government took actual physical possession or title to private property and used it for public purposes such as roads, dam construction, or urban renewal.<sup>128</sup> In this century, however, the taking concept is greatly expanded. Physical seizure or invasion is not required; instead, any overly restrictive regulation may give rise to a claim that a taking has occurred and that just compensation should be paid.<sup>129</sup>

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122. *Potomac Sand & Gravel v. Governor of Maryland*, 293 A.2d 241 (Md. 1972).

123. *Sands Point Harbor v. Sullivan*, 136 N.J. Super. 436, 346 A.2d 612 (N.J. Super. Ct. App. Div. 1975).

124. MODEL ORDINANCE, *supra* note 1, § V(B)(2)(b).

125. *See id.*, § V(C). Because of its length, this section of the Model Ordinance, which identifies the functions and values of wetlands the Ordinance protects, is not in the Appendix.

126. *Id.* § V(B)(2)(a).

127. U.S. CONST. amend. V. *See also* Simon, *The Supreme Court's 1987 "Takings" Triad: An Old Hat In A New Box or A Revolution in Takings Law?*, 1 U. FLA. J.L. & PUB. POL'Y, 103 (1987) (historical overview of takings cases).

128. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 71, at 401.

129. *Id.*

The Model Ordinance contains fairly strict limitations on what activities can be performed in wetlands.<sup>130</sup> The strong public policy of protecting important wetland functions favors these strict limitations. Nevertheless, local governments that impose strict land use regulations on private property must be concerned whether their regulations are so restrictive as to constitute a taking without just compensation. The variance procedures provided for in the Model Ordinance<sup>131</sup> are designed to eliminate the possibility that the Ordinance's provisions amount to a taking.

The determination of whether a taking occurs requires a balancing of public interests against the interest of the private landowner. For example, in *Agins v. City of Tiburnon*,<sup>132</sup> the Supreme Court stated "[t]he determination that governmental action constitutes a taking is . . . a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."<sup>133</sup> In *Agins* the city had adopted an open space zoning ordinance that restricted previously purchased five acre tracts to single residence. The Court noted the important and legitimate government goals of an open space ordinance which benefits landowners as well as the public by assuring careful orderly development.<sup>134</sup> Recognizing that the zoning did not prevent the best use of the land or extinguish any fundamental attribute of ownership, the Court held the good faith planning did not burden landowners enjoyment of their property as to constitute a taking.<sup>135</sup>

Whether a land use regulation amounts to a taking depends on the specific circumstances of the case. Several issues are involved in the taking determination.<sup>136</sup> The first issue requires a determination of the existing natural conditions on the site. In *Turnpike Realty Co. v. Town of Dedham*<sup>137</sup> the court held that an ordinance that restricted floodplains to agricultural and recreational uses did not constitute a taking. Because the ordinance was intended to prevent flooding damage, the court characterized it as an exercise of the police power, not

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130. See generally MODEL ORDINANCE, *supra* note 1, § IV (activities subject to regulation under the ordinance).

131. *Id.* § VII(F).

132. 447 U.S. 255 (1979).

133. *Id.* at 260.

134. *Id.* at 261-62.

135. *Id.* at 262-63.

136. The Model Ordinance is designed to address all of these issues. See generally MODEL ORDINANCE, *supra* note 1, § VII (administrative aspects of ordinance).

137. 284 N.E.2d 891 (Mass. 1972).

of eminent domain. The court noted that although the ordinance substantially restricted the applicant's use of his land, such restriction must be balanced against the potential harm to the public from over-development of a floodplain.<sup>138</sup>

Similarly, in *Just v. Marinette County*,<sup>139</sup> the Supreme Court of Wisconsin upheld severe restrictions on the use of flood prone lands. In *Just*, the landowner was prosecuted for violating a shorelands zoning ordinance by filling land adjoining a lake. The landowner claimed the ordinance was a taking. The court noted that the purpose of the restrictions was to protect navigable waters from degradation and deterioration and ruled against the landowner. The court stated a landowner has no absolute right to alter the natural character of his land to use it for a purpose for which it was unsuited in its natural state especially where injury results to the rights of others.<sup>140</sup> The court stated "[t]he changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationships is not a reasonable use of that land which is protected from police power regulation."<sup>141</sup>

In the Florida case of *Smith v. Clearwater*,<sup>142</sup> the court followed the approaches of *Turnpike Realty* and *Just* by considering the existing conditions of the land in making the takings determination. In *Smith*, a landowner alleged that a city zoning ordinance that rezoned more than one half of the landowner's property as "aquatic lands" usable only for recreational purposes constituted a taking. The court held the zoning change did not deny the owner's beneficial use of the property, and thus, was not a taking requiring just compensation.<sup>143</sup> The court stated that although the new zoning law severely restricted the use of the owner's wetlands, the owner could not have done much with the wetland without the zoning change.<sup>144</sup> It was unlikely the owner could have obtained permission to fill the wetlands even without the zoning restrictions.<sup>145</sup> Furthermore, the court noted that serious environmental considerations justified the zoning.<sup>146</sup>

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138. *Id.*

139. 201 N.W.2d 761 (Wis. 1972).

140. *Id.* at 768.

141. *Id.*

142. 383 So. 2d 681 (1980).

143. *Id.* at 685.

144. *Id.*

145. *Id.*

146. *Id.*

The Model Ordinance addresses this issue by restricting activities that destroy important wetland functions.<sup>147</sup> The destruction of important wetland functions, such as flood prevention, results in harm to the public. In most taking challenges to wetlands regulations, the harm to the public from allowing the proposed activity outweighs the benefit to the individual land owner. This assessment is based on the private uses of wetlands in their natural condition, not on the land in the altered condition necessary for development.

The second issue is whether a taking occurs on a site that contains both developable upland areas and wetlands. The United States Supreme Court in *Penn Central Transportation Co. v. New York City*<sup>148</sup> indicated that the determination of whether a governmental action constitutes a taking depends on how the regulation applies to the property as a whole. In *Penn Central* the owner of Grand Central Station challenged New York City's historic landmark protection ordinance. The ordinance designated the station as an historic landmark and gave the city a right to prevent structural alterations that would be incompatible with architectural values. The ordinance also gave the owner transferrable property development rights. The owner filed suit claiming a taking when the city rejected the owner's plans to construct a fifty story addition over the landmark.<sup>149</sup>

The Court held the rejection of the plan under the ordinance did not constitute a taking.<sup>150</sup> The Court's decision rested on the fact that the owner's property interest was merely diminished, not totally destroyed, and the regulation did not affect the property's existing use. The Court determined that the parcel as a whole was still useful. The Court stated "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."<sup>151</sup>

In the leading Florida case, *Graham v. Estuary Properties*,<sup>152</sup> the Florida Supreme Court found that a regulation that reduced the size of permissible development to one half of that proposed did not constitute a taking. A developer owned 6,500 acres of land adjacent to coastal waters. About 2,800 acres were red mangroves and 1,800 were black mangroves. The developer was denied approval for dredging

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147. MODEL ORDINANCE, *supra* note 1, § IV (activities subject to regulation under the Ordinance).

148. 438 U.S. 104, 131 (1978).

149. *Id.* at 108-09, 115-22.

150. *Id.* at 138.

151. *Id.* at 130-31, 136-38.

152. 399 So. 2d 1374 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981).

out the black mangroves and filling the remaining lands to construct 26,500 dwelling units. The developer challenged the denial to develop in the black mangroves as a taking.<sup>153</sup> The court determined the denial was not a taking based on the fact that the development proposal would have adversely affected important public interests in the estuary and that the developer failed to show the regulation had destroyed its beneficial interest.<sup>154</sup> The court noted that the regulation merely reduced the size of the proposed development by one-half.

The Model Ordinance addresses this second issue by requiring the local government to determine whether the proposed development site contains developable uplands as well as wetlands.<sup>155</sup> If so, under the *Penn Central* and *Estuary Properties* rationales, a taking should not be found. Likewise, a taking should not be found if the local government has a mechanism that provides owners of wetlands with transferrable density rights or the right to create "cluster developments" on uplands of higher densities than normally permitted.

A third issue requires a determination of the reasonable development expectations of the landowner/applicant. Courts have held that an otherwise valid ordinance may be a taking if it frustrates specific investment-backed expectations of the landowner. In *Penn Central*, the Court held that the denial of the proposed fifty story addition to Grand Central Station did not amount to a taking in part because the owners could continue using the station as they had for the past sixty-five years.<sup>156</sup> This use allowed a reasonable return on their investment. Other cases indicate that owners of wetland property may not have as great an expectation in development of the property as upland owners.<sup>157</sup>

The Model Ordinance addresses this third issue by requiring local governments to consider several factors relating to the investment-backed expectations of the landowner. For example, the Model Ordinance provides there exists no expectation in the development of sovereignty submerged lands.<sup>158</sup> Furthermore, because of stringent state regulations of mangrove lands, the Model Ordinance provides that owners have no reasonable development expectations in these lands.<sup>159</sup> Likewise, owners of land with no road access are presumed

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153. 399 So. 2d at 1376-77.

154. *Id.* at 1382.

155. MODEL ORDINANCE, *supra* note 1, § VII(F)(4)(a).

156. *Penn Central*, 438 U.S. at 136.

157. *See, e.g.*, *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

158. MODEL ORDINANCE, *supra* note 1, § VII(F)(4)(b)(1).

159. *Id.* § VII(F)(4)(b)(2).

to not have a reasonable development expectations.<sup>160</sup> The Model Ordinance also requires the local government to evaluate the appraisal value of the land, how much the owner paid for the land, when the owner purchased the land, and existing uses of the land.<sup>161</sup> Landowners who have subdivided land since 1975 to create lots containing only wetlands are presumed to not have a reasonable expectation of development.<sup>162</sup> The Model Ordinance also allows the local government to develop alternate design plans that will allow some use of the property to show the owner is not deprived of all reasonable economic use.<sup>163</sup>

In cases where courts find the Model Ordinance is so restrictive as to constitute a taking, a variance may be granted.<sup>164</sup> Alternatively, the local government may use its eminent domain power to purchase the property. If this alternative is chosen, a conservation easement shall be granted to protect the purchased property from future development.<sup>165</sup>

The importance of the Model Ordinance's variance procedure has become more evident with the recent United States Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*.<sup>166</sup> In *First English*, the Supreme Court held for the first time that where a regulation is so restrictive as to constitute a taking, invalidation of the regulation is not an adequate remedy.<sup>167</sup> Instead, the Court held that the Constitution requires the government to pay monetary compensation for damages incurred up to the point of judicial invalidation.<sup>168</sup> First Lutheran owned and operated a camp for handicapped children in Los Angeles county.<sup>169</sup> In 1978 all of the camp buildings were destroyed by a flood. The county responded by enacting a moratorium on building or reconstruction in the area. First

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160. *Id.* § VII(F)(4)(b)(3).

161. *Id.* § VII(F)(3).

162. *Id.* § VII(F)(4)(b)(4).

163. *Id.* § VII(F)(4)(c).

164. *Id.* § VII(F).

165. *Id.* § III(6). A conservation easement is a perpetual undivided right or interest in real property which is appropriate to retaining land or water areas predominately in their natural, scenic, open or wooded condition, retaining such areas as suitable for fish, plants, or wildlife, or maintaining existing land uses, and which prohibits or limits certain specified activities which involve altering the present use or state of the land or water areas. Conservation easements are enforceable and run with the land.

166. 107 S. Ct. 2378 (1987).

167. *Id.* at 2389.

168. *Id.*

169. *Id.* at 2381.



Lutheran then sued the county, alleging the county was liable for damages because the regulation denied the church of all use of its property. The California courts found that invalidation of a regulation that amounted to a taking was a sufficient remedy. The Supreme Court reversed holding that the Constitution requires the payment of damages for the deprivation caused by the taking.<sup>170</sup> The Court was not asked to decide, nor did it decide, whether the regulation did indeed result in a taking.<sup>171</sup>

The Model Ordinance minimizes the risk that the local government may have to pay damages if a taking is found by establishing permit review procedures to ensure that local governments consider the taking issue before final agency action is taken.<sup>172</sup> A judicial determination of whether an agency action results in a taking cannot be made until the agency action is final.<sup>173</sup> Under the Model Ordinance, a permit decision is not final until after the landowner has an opportunity to present evidence on the taking issue.<sup>174</sup> If the local government finds a taking does exist, it may grant the variance and eliminate the risk of having to pay damages for the period of time the matter is tied up in litigation.<sup>175</sup>

## 5. Non-Delegation Doctrine

The non-delegation doctrine states that the delegation of legislative authority to governmental officials without definite standards or guidelines to constrain the scope of administrative decision-making is unconstitutional.<sup>176</sup> Thus, a local government ordinance that vests arbitrary discretion in local governmental administrative officials violates the doctrine.<sup>177</sup> The purpose of the non-delegation doctrine is to imple-

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170. *Id.* at 2389.

171. *Id.* at 2384-85. Because the court did not address the issue of whether the regulation resulted in a taking, the "takings" analysis from previous case law still applies. *See supra* notes 127-165 and accompanying text. *See also* Simon, *supra* note 127, at 124-27 (discussing the implications of the *First English* decision).

172. MODEL ORDINANCE, *supra* note 1, § VII(F).

173. *Id.*

174. *Id.*

175. *Id.*

176. *See* O. REYNOLDS, *supra* note 13, at 160-61. The author states, however, that "[t]he rule against delegation of state legislative authority is no barrier to the delegation of powers of local self-government to local units." *Id.* at 160 (emphasis in original). This principle permits a state government to delegate powers to local government that the state itself cannot directly exercise.

177. *Id.* at 161-62. Three basic rules apply to delegations of authority by local governments: (1) delegation of any governmental power to private individuals is impermissible; (2) delegation

ment the constitutional separation of powers among branches of government.<sup>178</sup> In the leading Florida case on non-delegation, *Askew v. Cross Key Waterways*,<sup>179</sup> the Florida Supreme Court held that sections of the Florida Environmental Land and Water Management Act were unconstitutional violations of the non-delegation doctrine because an administrative body was required to make fundamental policy decisions without adequate standards.<sup>180</sup>

Although the Model Ordinance delegates decision-making authority to the Issuing Authority, the delegation is accompanied by clear expressions of legislative intent and definite and precise standards.<sup>181</sup> Local governments that use the Model Ordinance should not insert additional open-ended standards such as "other factors deemed to be in the public interest." Courts have invalidated these types of open-ended standards because they fail to allow for adequate judicial review and fail to adequately inform affected citizens of what such standards mean.<sup>182</sup>

#### IV. CONCLUSION

In order to protect Florida's dwindling wetland resources, local governments must enact stringent wetlands protection laws. Citizens and local governments cannot rely upon state and federal agencies to adequately protect these important natural resource systems. Local governments are better equipped to regulate uses in wetlands as part of their comprehensive planning responsibilities. Wetlands regulations must meet several criteria to both insure their constitutionality to minimize the risk of having to pay damages for temporary takings. First, the regulation must be reasonably related to a valid regulatory objective. A wetlands ordinance that only restricts activities that adversely effect important wetlands functions will almost always survive a substantive due process challenge.

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of law-making or policy formulating powers is impermissible; and (3) any delegation of power by the city's legislative body must be accompanied with adequate standards to guide the exercise of the power. *Id.* at 162.

178. See *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978) (interpreting the separation of powers provision in article II, section 3 of the Florida Constitution).

179. 372 So. 2d 913 (Fla. 1978).

180. *Id.* at 925.

181. Section I clearly states the legislative intent underlying the ordinance. MODEL ORDINANCE, *supra* note 1, § 1. In addition the ordinance classifies wetlands by type and further specifies each type of wetland function the ordinance protects. Thus, the ordinance provides clear guidelines to landowners.

182. See O. Reynolds, *supra* note 13, at 167-68. See also *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978).

Second, the regulation must not be so confiscatory as to constitute a taking without just compensation. A wetlands ordinance should provide a screening mechanism that local governments can use to determine whether the application of the ordinance to a particular landowner constitutes a taking; this determination must occur prior to final agency action. This procedure minimizes the risk of successful taking challenges. If a taking does occur, the local government can grant a variance allowing the landowner the minimal economic use of his property necessary to avoid a taking challenge. Alternatively, the local government may choose to purchase the wetland property through its eminent domain power. The Model Ordinance provides an outline of the factual issues, based on existing case law, that local governments should consider in the taking determination. The variance procedure allows a local government to give a landowner an opportunity to present evidence on the taking issue before final agency action is taken. Thus, if the local government finds a taking does exist, it may grant the variance eliminating the risk of having to pay damages for the period of time the matter is tied up in litigation.

Finally, wetlands regulations must meet the constitutional requirements of procedural due process, equal protection, and the non-delegation doctrine. These requirements are primarily matters of thorough and precise drafting of the wetlands ordinance in conformity with existing United States Supreme Court and Florida Supreme Court case law. The Model Ordinance provides a prototype for local governments to utilize in drafting their own regulations to protect their jurisdiction's wetlands systems.

## APPENDIX

### RELEVANT SECTIONS FROM A MODEL WETLANDS PROTECTION ORDINANCE

#### I. FINDINGS OF FACTS AND OBJECTIVES

A. This ordinance is based on a finding based on the following facts:

1. Both wetlands contiguous to waters of the state and isolated wetlands serve the following important functions in the regional hydrologic cycle and ecological system:
  - a. Riverine wetlands and adjacent floodplain lands provide natural storage and conveyance of flood waters.
  - b. Coastal wetlands, and inland wetlands adjoining larger lakes and rivers, act as barriers to waves and erosion.

- c. Inland wetlands provide temporary storage of surface waters during times of flood, thereby regulating flood elevations and the timing, velocity, and rate of flood discharges.
  - d. Wetlands reduce flood flows and the velocity of flood waters, reducing erosion and causing flood waters to release their sediment. Wetland vegetation filters and holds sediment which would otherwise enter lakes and streams.
  - e. Wetlands protect water bodies from sediments, nutrients, and other natural and man-made pollutants. Wetland vegetation filters sediment, organic matter, and chemicals. Microorganisms utilize dissolved nutrients and breakdown organic matter.
  - f. Coastal wetlands are important sources of nutrients for the commercial fish and shellfish industries. Inland wetlands are also important to freshwater fisheries as spawning grounds.
  - g. Both coastal and inland wetlands provide essential breeding and predator escape habitats for many forms of waterfowl, mammals, and reptiles.
  - h. Wetlands are depended upon by almost 35% of all rare and endangered animal species.
  - i. Wetlands provide excellent recreational opportunities including recreational fishing, hunting, camping, photography, boating, and nature observation.
  - j. Wetlands are important as a source of ground and surface water.
- 2. Considerable acreage of wetlands have been lost, and their important functions impaired, by draining, dredging, filling, excavating, building, polluting, and other acts. Remaining wetlands are in jeopardy of being lost or impaired by such acts. The loss of important wetlands functions is contrary to the public safety and welfare.
  - 3. Current federal and state wetlands regulations provide inadequate protection of important wetlands functions.
- B. This ordinance has the following objectives:
- 1. To minimize the potential for property damage and personal injury from flooding.
  - 2. To prevent increases in erosion.
  - 3. To maintain optimum storage capacity of watersheds.
  - 4. To prevent increased sedimentation.
  - 5. To maintain water quality.

6. To maintain recharge for groundwater aquifers.
7. To maintain breeding, nesting, and feeding areas for water fowl and shore birds, including rare and endangered species.
8. To maintain the exchange of nutrients needed by fish and other forms of wildlife.
9. To maintain habitat for fish and other wildlife.
10. To maintain sites needed for education and scientific research as outdoor biophysical laboratories, classrooms, and training areas.
11. To protect the public's rights in navigable waters.
12. To protect the recreation opportunities of wetlands for hunting, fishing, boating, hiking, nature observation, photography, camping, and other uses.
13. To protect aesthetic and property values.

IV. ACTIVITIES SUBJECT TO REGULATION UNDER THE ORDINANCE:

1. Activities within the Areas Subject to Protection Under the Ordinance

Any activity proposed or undertaken within an area specified in Section III. which will remove, fill, drain, dredge, or in any way alter that area is subject to regulation under the Ordinance and requires the filing of a Notice of Intent.

2. Activities within the Buffer Zone

Any activity proposed or undertaken within 100 feet of an area specified in Section III. (hereinafter referred to as the Buffer Zone) which, in the judgment of the Issuing Authority, will alter an Area Subject to Protection Under the Ordinance is subject to regulation under the ordinance and requires the filing of a Notice of Intent. Any person who proposes to perform work within the Buffer Zone shall file a Request for a Determination of Applicability. The request shall include sufficient information to enable the issuing authority to find and view the area and to determine whether the proposed work will alter an Area Subject to Protection Under the Ordinance.

3. Areas Outside the Area Subject to Protection Under the Act and the Buffer Zone Area Subject to Protection Under the Act and the Buffer Zone

Any activity proposed or undertaken outside the areas specified in Section III. and outside of the Buffer Zone is

not subject to regulation under the Ordinance and does not require the filing of a Notice of Intent unless and until that activity actually alters an Area Subject to Protection Under the Ordinance.

In the event that the Issuing Authority determines that such activity has in fact altered an Area Subject to Protection Under the Ordinance, it shall impose such conditions, including mitigation, on the activity or any portion thereof as it deems necessary to contribute to the protection of the functions identified in the Ordinance.

## V. REGULATIONS FOR WATERCOURSES, WATER BODIES AND WETLANDS

### A. *General Provision*

The regulations contained in this Section apply to all activities which will remove, fill, drain, dredge, or in any way alter any contiguous or isolated wetland.

### B. *Presumptions and Burden of Proof*

#### 1. Presumptions of Function Performance

Each type of wetland subject to protection under the Ordinance is presumed to perform the functions identified in Section V.- C of the Ordinance.

#### 2. Burden of Proof

Any person who files a Notice of Intent to perform any activity within an Area Subject to Protection Under the Ordinance, or within the Buffer Zone, has the burden of demonstrating to the Issuing Authority that:

- a. the particular wetland does not perform any of the functions that it is presumed to; or
- b. the proposed activity will have an insignificant effect on any of the functions the particular wetland is presumed to perform.

#### 3. Cumulative Effects

To show that the proposed activity will have an insignificant effect on wetland functions, the applicant must show that the cumulative impacts of all persons owning land in that wetland carrying out the proposed activity would have an insignificant effect on wetland functions. An applicant can do this by showing that the cumulative impact will have an insignificant effect on wetland functions, by showing that the proposed activity is unique, and therefore, will not be attempted by other landowners, or by showing that other landowners are barred from attempting that activity (i.e., because they have given a conservation ease-

ment on their land, or because their land is in a Special Management Area which prohibits the proposed activity).

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G. *Water Dependent Activities*

1. Certain water dependent activities that are otherwise impermissible, may be permitted if the applicant shows the public interest served by the activity substantially outweighs any adverse environmental effects and that no practicable alternative for the activity exists. Any significant adverse effects shall be first reduced by the imposition of permit conditions such as those in Section V.-E. If permit conditions are inadequate to reduce adverse effects to a permissible level, mitigation shall be required. The applicant does not have the burden to show no significant effect for water dependent activities. Instead, the applicant has the burden of showing the public interest served substantially outweighs the adverse environmental effects.

Permissible water dependent activities may include:

- a. Projects not exceeding 10,000 cubic yards of material placed in or removed from watercourse, water bodies or wetlands;
- b. Dockage or marinas not exceeding 30,000 square feet and containing less than 100 slips (existing and proposed);
- c. New riprap, vertical bulkheads, seawalls or similar structures not exceeding 50 feet of shoreline;
- d. Installation of buoys, aids to navigation, signs, and fences;
- e. Performance for 10 years from the date of the original permit, maintenance dredging;
- f. Installation of subaqueous transmission and distribution lines entrenched in (not exceeding 10,000 cubic yards of dredging), laid on, or embedded in bottom waters which carry water, wastewater, electricity, communication cables, oil or gas;
- g. Construction of foot bridges and vehicular bridges;
- h. Replacement or widening of bridges on pilings or trestles where the effects of pollutants discharged into open waters can be minimized;
- i. Construction of artificial reefs;
- j. Performance of maintenance dredging, as long as less than 10,000 cubic yards of material is removed.

- k. Public utilities and other public service activities that require corridors as a location.
2. Water dependent activities do not include waterfront housing.

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## VII. ADMINISTRATION

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### E. *Judicial Review*

1. Any decision denying or approving a permit shall be judicially reviewable in Circuit Court.
2. Any person adversely affected by a decision shall have standing to challenge the decision as being unconstitutional, or inconsistent with the goals of the Ordinance

### F. *Variances*

1. A variance may be given where an applicant succeeds in a challenge of the application of the Ordinance as being so restrictive as to constitute a "taking."
2. A taking will only be found where the ordinance, as applied to an applicant's land, is so restrictive as to deprive the landowner of substantially all of the use of his property.
3. When an applicant challenges the ordinance as applied to him as a taking, the Issuing Authority shall hold a hearing at which the applicant may present evidence to support his challenge. The Issuing Authority shall hear evidence and make the final determination as to the taking issue. In making the taking determination, the Issuing Authority shall consider factors such as:
  - a. How much the owner paid for the property.
  - b. When the owner purchased the property.
  - c. Current fair market value of the property.
  - d. If the owner owns any additional property which may be benefited by leaving the wetland property in its natural state. Such benefits may include view, access to water, and docks.
4. A taking does not exist, and therefore, a variance will not be given if:
  - a. The site contains developable uplands as well as wetlands (the Issuing Authority may provide for the maximum use of the applicant's uplands by allowing "cluster" development in the uplands or by providing the applicant with transferrable density rights).
  - b. The applicant does not have reasonable develop-



ment expectations in his wetland property. No reasonable development expectation exists when:

1. The property involved is submerged land.
  2. The property involved is a mangrove forest.
  3. The property involved has no road access.
  4. The property involved was subdivided after 1975 so as to make the lot contain only wetlands.
- c. The Issuing Authority can show an alternate design plan that will allow some use of the property.
5. A variance will be granted only to the extent necessary to allow a reasonable use to avoid a finding of a taking.
  6. If an applicant qualifies for a variance, mitigation shall be required to ensure no net loss of wetland function results.
  7. As an alternative to granting a variance when application of the ordinance would result in a taking, the Issuing Authority may use its eminent domain power to purchase the property from the applicant. Where the Issuing Authority chooses this alternative, a conservation easement shall be granted to protect the purchased property from future development.